

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Residential Building
Contractor License of Advantech Enterprise, Inc.,
and Jeffrey Richard Hohertz, Individually

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for a hearing before Administrative Law Judge Barbara L. Neilson on October 12, 2010, at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota.

Michael J. Tostengard, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Vytas Rimas, Rimas Law Firm PLLC, appeared on behalf of Respondents Advantech Enterprise, Inc., and Jeffrey Richard Hohertz.

The OAH hearing record remained open until November 15, 2010, for the receipt of post-hearing submissions. None were received.

STATEMENT OF THE ISSUES

1. Did Advantech Enterprise, Inc., and its principal, Jeffrey Hohertz, engage in conduct that violated Chapter 326B of the Minnesota Statutes? Specifically, did they:

- a. engage in a fraudulent, deceptive or dishonest practice by performing roofing work without obtaining all applicable permits and inspections, in violation of Minn. Stat. § 326B.84(2) (2008) and Minn. R. 2891.0040, subp. 1H (2009);
- b. demonstrate financial irresponsibility or that they are otherwise unqualified to act under a license granted by the Commissioner, in violation of Minn. Stat. § 326B.84(15) (2008);
- c. fail to notify the Commissioner in writing of an outstanding judgment, in violation of Minn. Stat. § 326B.805, subd. 5 (2008); or
- d. fail to respond to the Commissioner's December 10, 2009, request for information, in violation of Minn. Stat. § 326B.84(16) (2008)?

2. If so, should the Minnesota Department of Labor and Industry discipline the residential building contractor license of Advantech, impose a monetary penalty, and

require that Advantech and Mr. Hohertz cease and desist from acting or holding themselves out as a residential building contractor, remodeler, or roofer in Minnesota, in accordance with the Department's Licensing Order issued on March 24, 2010?

Based on the record and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent Advantech Enterprise, Inc., has been licensed as a residential building contractor since 1998. Respondent Jeffrey Richard Hohertz is the principal owner of Advantech.¹ There is no evidence that any prior disciplinary action has been taken by the Department against either of the Respondents.

2. On August 10, 2009, the Department began an investigation of Respondents based on a complaint it received from Timothy Sievers, a homeowner in Monticello, Minnesota.²

3. In August 2008, Sievers contracted with Respondents to install a new roof and siding on his home. The estimate provided by Advantech specifically stated that permit fees for the roofing and siding work were included in the price to be charged to Sievers. The work was completed in a timely manner and Sievers paid Respondents in full.³

4. In early 2009, Sievers noticed that several pieces of siding were falling off his home. He also noticed that a section of his roof was not replaced; instead the old shingles remained. He also experienced problems with water intrusion. Sievers called and emailed Respondents regarding these concerns but he received no response.⁴

5. In the spring of 2009, Sievers confronted Respondent Hohertz when he saw him working in the neighborhood. Sievers showed Respondent Hohertz the problem areas and Hohertz said that he would return to fix the problems. Respondent Hohertz attempted to repair the roofing work that day, but he used shingles that did not match the shingles installed in 2008. Sievers informed him that that was not satisfactory and Hohertz promised that he would be back. Sievers thereafter made numerous telephone calls and sent numerous email requests asking when Hohertz would return. Eventually, Hohertz sent an email message promising that he would return in July 2009 to correct the mistakes he had made. However, the Respondents never returned to make the repairs.⁵

¹ Testimony of Thomas Sendeky; Testimony of Jeffrey Hohertz; Licensing Order at 1 (March 24, 2010) (attached as Exhibit A to Notice of and Order for Prehearing Conference).

² Test. of T. Sendeky; Ex. 1 at 6.

³ Ex. 1 at 4; Licensing Order at 1.

⁴ Test. of T. Sendeky; Ex. 1 at 6; Licensing Order at 1-2.

⁵ Ex. 2 at 6; Licensing Order at 2.

6. Sievers inquired with the City of Monticello and discovered that Respondents had not applied for or been granted a building permit to reroof his home. Respondents did obtain a siding permit for complainant's home, but they failed to obtain final inspections as required.⁶

7. Sievers had another contractor inspect Respondents' work. He was told that the repairs would be so extensive that it would be less costly to start over and remove the roof and siding.⁷

8. Sievers then filed a lawsuit against Respondent Hohertz in Carver County Conciliation Court. The Court amended the caption *sua sponte* to include Advantech, dismissed the action as to Hohertz individually, and entered judgment in Sievers' favor against Advantech in the amount of \$7,580. The judgment was entered on October 22, 2009. Sievers provided the Department with a copy of the entry of judgment.⁸

9. Respondent Advantech did not notify the Department of the entry of the judgment in the Sievers case.⁹

10. Upon further investigation, the Department learned that Respondents were the subject of two prior unsatisfied civil judgments:¹⁰

- On February 9, 2004, Phillip and Julia Bernt and Mutual Service Casualty Insurance Company were awarded a judgment against both Respondents in Ramsey County District Court in the amount of \$1,661.¹¹
- On March 29, 2007, Gerald and Janice Strand were awarded a judgment against Respondent Advantech in Carver County Conciliation Court in the amount of \$1,760.¹²

11. On December 10, 2009, the Department sent a letter to Respondents requesting that they send the Department a written response to the Sievers complaint and to what appeared to be outstanding civil judgments by no later than December 23, 2009. In the letter, the Department warned Respondents that a failure to respond to the Commissioner's request for information would constitute a violation of Minn. Stat. § 326B.082, subd. 11(6), and could result in revocation of Advantech's license and the imposition of civil penalties.

12. Respondents never responded to the Department's information request.¹³

⁶ Test. of T. Sendecky; Ex. 1 at 6; Licensing Order at 2.

⁷ Ex. 1 at 6; Licensing Order at 2.

⁸ Test. of T. Sendecky; Ex. 1; Ex. 2; Ex. 6.

⁹ Test. of T. Sendecky.

¹⁰ Test. of T. Sendecky; Ex. 3.

¹¹ Ex. 3.

¹² Ex. 3.

¹³ Ex. 3; Test. of T. Sendecky; Test. of J. Hohertz.

13. On March 24, 2010, the Commissioner issued a Licensing Order revoking Advantech's residential building contractor license and imposing a monetary penalty of \$5,000. The Commissioner also ordered both Respondents to cease and desist from acting or holding themselves out as a residential building contractor, remodeler or roofer in the state of Minnesota. The Licensing Order was based on the Respondents' violations of Chapter 326B; their failure to obtain the necessary permits for the Sievers project; their demonstration of financial irresponsibility; their failure to notify the Commissioner of the judgments entered against them; and the failure to respond to the Commissioner's December 10, 2009, request for information.¹⁴

14. On April 23, 2010, Respondents requested a contested case hearing to appeal the Licensing Order.¹⁵

15. On October 11, 2010, Respondents satisfied the judgment awarded to Gerald and Janice Strand in the amount of \$2,795.¹⁶

16. On October 11, 2010, Respondent Hohertz made a payment to the Contractor Recovery Fund in the amount of \$7,500.¹⁷

17. On October 11, 2010, the Department learned that two additional judgments had been entered against Respondent Hohertz:

- On November 3, 2004, Leon Duda Plumbing was awarded a civil judgment against Respondent Hohertz and Gena Hohertz, his then wife, in the amount of \$7,570.
- On December 3, 2007, Thompson Heating was awarded a civil judgment against Respondent Hohertz and Gena Hohertz in the amount of \$2,546.26.¹⁸

These judgments related to the private residence Respondent Hohertz built for his family.¹⁹

18. None of the judgments docketed against Respondent Hohertz were reported to the Department.²⁰

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

¹⁴ Licensing Order at 3.

¹⁵ Letter to Department from counsel for Respondents (April 23, 2010) (attached as Ex. B to Notice of and Order for Prehearing Conference).

¹⁶ Test. of J. Hohertz; Ex. 4.

¹⁷ Ex. 5.

¹⁸ Test. of T. Sendeky; Ex. 6.

¹⁹ Test. of J. Hohertz.

²⁰ Test. of T. Sendeky.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50, 326B.082, and 326B.84.

2. Respondents received due, proper and timely notice of the charges against them, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.²¹

4. The Commissioner may deny, suspend, limit, place conditions on, or revoke a license, or may censure the person holding the license, if the licensee or qualifying person has:

- a. engaged in a fraudulent, deceptive or dishonest practice;²²
- b. engaged in an act or practice that demonstrates the licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the license granted by the commissioner; or²³
- c. failed to comply with requests for information, documents, or other requests from the department within the time specified in the request or, if no time is specified, within 30 days of the mailing of the request by the department.²⁴

5. Licensed residential building contractors must notify the Commissioner in writing if the licensee is found to be a judgment debtor based upon conduct requiring licensure within 15 days of the finding.²⁵ Failure to comply with this obligation is grounds for discipline under Minn. Stat. § 326B.84(5).

6. Respondents engaged in a fraudulent, deceptive or dishonest practice by performing roofing work without obtaining all applicable permits and inspections, in violation of Minn. Stat. § 326B.84(2) and Minn. R. 2891.0040, subp. 1H.

7. By not paying the judgments entered against them, Respondents have demonstrated that they are financially irresponsible and are otherwise unqualified to act under a license granted by the Commissioner, in violation of Minn. Stat. § 326B.84(15).

²¹ See Minn. R. 1400.7300 (5).

²² Minn. Stat. § 326B.84(2); Minn. Stat. § 326B.082.

²³ Minn. Stat. § 326B.84(15); Minn. Stat. § 326B.082.

²⁴ Minn. Stat. § 326B.84(16); Minn. Stat. § 326B.082.

²⁵ Minn. Stat. § 326B.805, subd. 5(c).

8. Respondents failed to respond to the Department's December 10, 2009, request for information, in violation of Minn. Stat. § 326B.84(16).

9. Respondent Advantech failed to notify the Commissioner within 15 days of the entry of judgments in favor of the Sievers, the Bernts and Mutual Service Casualty Insurance Company, and the Strands, in violation of Minn. Stat. § 326B.805, subd. 5.

10. The March 24, 2010, Licensing Order imposing disciplinary action and assessing a monetary penalty against the Respondents is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of the Minnesota Department of Labor and Industry AFFIRM the Licensing Order dated March 24, 2010, and take appropriate disciplinary action against Respondents Advantech Enterprise, Inc., and Jeffrey Richard Hohertz.

Dated: December 9, 2010

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Digitally Recorded;
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Cynthia Valentine, Acting Commissioner, Attention: Wendy Willson Legge, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155 (651) 284-5126 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to

determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Respondents do not dispute that they violated the licensing statutes and rules set forth above. Mr. Hohertz testified that he responded to the Sievers' requests to make the necessary repairs to the siding and roofing work on their home, and that he attempted to make the necessary repairs, but that in the end, they were unable to reach an agreement as to what needed to be done. He did not dispute that repairs of some sort needed to be made, and he was not able to convince the Conciliation Court Judge that judgment should not be entered against Advantech. The Judge noted in the Memorandum that the work performed on the Sievers' home was "far below industry standards."²⁶

Respondents also did not contest the Department's allegation that the work was performed on the Sievers' home without pulling the appropriate permits and obtaining the required inspections. It is evident that Mr. Hohertz did not notify the Department of any of the judgments entered against Advantech or himself, and that he never responded to the Department's request for information about the Sievers' complaint or the judgments. Even if (as Mr. Hohertz testified) the Department's letter was not received until after the deadline for response had passed, it does not excuse or explain Respondents' failure to provide any response to the Department's inquiry.

Respondent testified that he separated from his wife in August 2007 and they subsequently divorced, and explained that the turmoil and disruption caused him to overlook some aspects of his business. He also testified that the economic downturn had a devastating impact on his business and that the economy combined with the costs associated with establishing a separate household caused him to suffer financial difficulty. He stated, however, that he is now settled in his home and that his financial difficulties are easing.

When Mr. Hohertz attempted to pay the Sievers' judgment, he was told by the State to instead provide payment to the Contractor Recovery Fund (presumably because the Sievers had already been paid from that fund). Accordingly, Mr. Hohertz paid \$7,500 to the Contractor Recovery Fund the day before the hearing. As the Department pointed out at the hearing, Minn. Stat. § 326B.84 (9) authorizes the Commissioner to take disciplinary action against a licensee who has engaged in an act or practice that results in compensation to an aggrieved person from the contractor

²⁶ Ex. 2.

recovery fund unless “(i) the licensee has repaid the fund twice the amount paid from the fund, plus interest at the rate of 12 percent per year; and (ii) the applicant or licensee has obtained a surety bond in the amount of at least \$40,000” There is no evidence that the Respondents have complied with these further requirements.

Mr. Hohertz stated that he had satisfied the judgment obtained by Leon Duda Plumbing two years ago and that he was paying the judgment obtained by Thompson Heating pursuant to a repayment agreement. Although Mr. Hohertz requested and received the opportunity to submit supporting documentation regarding the Duda and Thompson matters after the hearing, he had not submitted any further materials by the date of this Report. Moreover, there was no allegation by the Respondents that they had satisfied the judgment obtained by the Bernts and Mutual Service Casualty Insurance Company in 2004.

Under the circumstances, it is recommended that sanctions be imposed against Respondents in accordance with the Department’s March 24, 2010, Licensing Order.

B. L. N.